RECENT AMERICAN DECISIONS.

Supreme Court of California.

SESLER v. MONTGOMERY.

1. The speaking of slanderous words by a husband to his wife, is a publication of them.

2. A communication by a husband to his wife, in regard to a female friend of hers, accusing her of perjury and want of chastity, *held*, not privileged where the husband and wife were on bad terms and the plaintiff had testified in her behalf in divorce proceedings between them.

3. Under a statute providing that evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, comment to the jury upon the failure of defendant to introduce his wife to corroborate his own testimony, is proper.

Appeal from the Superior Court of Alameda county.

Action by Mary A. Sesler against A. Montgomery for slander. Judgment for plaintiff, and defendant appeals.

Estee, Wilson & McCutchen, J. C. Martin, and *W. F. Goad,* for appellant.

W. W. Allen, A. R. Cotton, and *W. H. H. Hart,* for respondent.

HAYNE, C. December 3, 1888. Action for slander. Verdict and judgment for plaintiff. Defendant appeals. Several points are made.

1. It is said that there was no publication. The facts are that the words were spoken to the defendant's wife, and were overheard by the plaintiff, who was listening in the corridor. The point is that husband and wife are in law one person, and that therefore a communication between them is not "published," within the meaning of the law of slander. It is to be observed that this is a different thing from saying that the communication was privileged. There must be a publication before the question of privilege can arise. We have not been referred by appellant to any decision in support of the precise point, except *Trumbull* v. *Gibbons* (1818), 3 City H. Rec. (N. Y.) 97, decided by an inferior court. We have not had access to this report, but from the mention of the case in Townshend

on Slander, we should infer that the decision proceeded on another ground, and that what is said in relation to the question in hand, is merely a *dictum.* Nor have we been able to find any case exactly in point. Upon principle, we should say that there was a publication. That husband and wife are one person, is a mere fiction, and is not true for all purposes. The tendency of modern law, especially in California, is certainly not to extend the operation of the fiction. Nor do we see any reason why it should be extended, at least in the present direction. The reputation of a woman can certainly be injured by slanderous communications to her female friends; and the fact that the communication came through a husband, would not ordinarily deprive it of its injurious effect. Furthermore, if husband and wife are one person to the extent that a communication from the husband to the wife, concerning a third person is not published, it would seem to follow that a communication from a third person to one of the spouses concerning the other, would not be a communication concerning a third person, so as to constitute a slander. But the contrary has been decided. A communication to one of the spouses concerning the other may be slander: *Wenman* v. *Ash* (1853), 13 C. B. 836; *Schenck* v. *Schenck* (1843), 20 N. J. L. 208; Odgers on Lib. & Sland. *152, *153. That the result is the same in each case, is stated by Townshend, who says: "The husband or wife of the author or publisher, or the husband or wife of him, or whose affairs the slander concerns, is regarded as a third person:" Townshend on Lib. & Sland. § 95. We think, therefore, that a communication from a husband to his wife may constitute a publication.

2. It is contended that there was no evidence that the wife heard or understood the words uttered. The words imputed to the plaintiff perjury and a want of chastity, and hence were slanderous *per se.* They were not ambiguous, and were spoken of the plaintiff, and could not have referred to any other person. This being the case, the only possible point that can be made in this regard is that there is no proof that the wife heard or understood the words at all. It is certainly true that the slanderous words must be heard and understood. And it may be conceded that the burden is on the plaintiff to prove the

hearing and understanding. But where a man converses with his wife in a room in such a tone of voice that he can be heard and understood by a person outside of the room, it is hardly possible that the wife did not hear and understand him. If the wife was deaf, or did not understand the language, or any other peculiar circumstance existed to prevent what would be the ordinary result, we think the defendant should have proved it. What was proved was sufficient to overcome the burden we have assumed to be on the plaintiff in the first instance.

3. It is urged that the communication was privileged. The Code provides that a privileged communication is one made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Civil Code, § 47. It is clear from the above that, if there be malice, the communication cannot be privileged, and the question of the existence of malice is one for the jury. In this case the jury was instructed that, if no malice was shown, the communication was privileged. It must be assumed from their verdict, therefore, that they believed that there was malice; and, although malice is not to be inferred from the mere fact of the publication (Id. § 48), we cannot say from the record that the jury was not justified in finding the existence of malice. The circumstances were such as to negative the theory that the communication was for justifiable purposes. At the time it was made, the defendant was on bad terms with his wife. A suit for the annulment of the marriage was then pending. The plaintiff was an acquaintance of the wife, and had come, at the wife's request, to give the protection of her presence against any outbreak on the part of the husband. She had testified on behalf of the wife in the suit above mentioned. The charge of perjury was probably made by the husband with reference to this testimony, and the inference is strong that it was resentment on his part at her testifying on the part of the wife, and not solicitude for the welfare of his family, that caused him to utter the slander. This inference is not weakened by the circumstance that the interview be-

tween the defendant and his wife was a stormy one; that he "became so excited" that he called his wife a liar; that the communication with reference to plaintiff was coarse and brutal in its nature; and that "he spoke in an angry tone." Taking everything together, we think there was evidence from which the jury could infer malice. Hence the communication was not privileged.

4. It is claimed that there was an irregularity of counsel for the plaintiff in the argument to the jury. During the trial the plaintiff called the defendant's wife to the stand, and after she had been sworn, and testified that she was his wife, the defendant's counsel objected to any further testimony from her, on the ground that the consent of the defendant to her being a witness had not been obtained. There was no ruling upon the point. The plaintiff withdrew the witness, and she was not subsequently recalled by either party. This left a direct conflict between the plaintiff and the defendant as to whether the slanderous words were uttered. The plaintiff affirmed the fact, and the defendant positively denied it. During the argument the plaintiff's counsel began by referring to the objection which had been made to the wife's testifying, and was proceeding to argue from it that an inference against the truth of the testimony of the defendant should be drawn. The counsel for the defendant objected to this line of argument; but the Court overruled the objection, and the counsel for the plaintiff proceeded with his argument, dwelling mainly upon the failure of the defendant to call his wife as a witness. We think the action of the Court was proper. Where it is in the power of a party to call a witness who can corroborate or disprove his statements, his failure to call such a witness is a legitimate subject of comment to the jury. Such a case falls within the scope of subdivision 6 of section 2061 of the Code of Civil Procedure, which provides that "evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other side to contradict." See, also, *Gray* v. *Burk* (1857), 19 Tex. 228. The non-production of evidence in such case is a circumstance from which the jury may draw an inference of fact. If this is so, it is permissible to counsel to ask

them to draw such inference; and it is a matter of every-day occurrence for counsel to make such arguments. The case is not similar to that of a person accused of crime; for the statute expressly provides, with reference to cases where the prisoner does not testify, that "his neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or other proceeding:" Pen. Code, §1323. Now, in the present case, the wife was perfectly competent to be a witness if the defendant had consented. The slanderous words having been alleged to have been spoken to her, she could have corroborated or disproved his statements; and the circumstances excluded any idea that the communication was in fact confidential. He exercised much ingenuity to avoid admitting that she was his wife. His failure to consent was the sole reason she could not testify; and under the circumstances we think that the case falls within the rule above stated, and that the failure to give his consent was a subject of comment to the jury. It is to be observed that there was no ruling of the Court upon the admissibility of the testimony, the witness having been withdrawn before a ruling was made; and there was no attempt to argue against the justice of the law, or to induce the jury to disregard the law, and it is therefore unnecessary to express an opinion as to what would have been the result, had such circumstance existed. Moreover, we are not to be understood as saying that in every case in which a party fails to produce a witness, such failure may be commented on to the jury. The fact sought to be inferred may not be an issue in the case, (*Fletcher* v. *State* (1874), 49 Ind. 124), or may not be proper for the consideration of the jury: *Rudolph* v. *Landwerlen* (1883), 92 Id. 34. The whole subject of the latitude to be allowed counsel in argument, rests very much in the discretion of the trial court, and an exercise of such discretion should not be disturbed, except in a clear case. The other points do not require special notice. We do not see any contradiction in the instructions. The charge of the Court seems to have correctly presented the case to the jury. We think that the defendant had a fair trial, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MCFARLAND, J., (*concurring.*) I concur in the judgment; but I am not prepared to say that there would have been a publication, if, at the time the slanderous words were spoken by defendant to his wife, he had been living with her in the friendly and confidential relation which usually exists between husband and wife.

Except in an early case in New York, in a city court, where it was said that the delivery of a libel by the author to his wife is privileged, (*Trumbull* v. *Gibbons* (1818), 3 City H. Rec. (N. Y.) 97), the main question in the principal case has not heretofore arisen in our courts. Mr. Odgers states that it has never arisen in England, "probably because in every such case there has been an immediate and undoubted publication of the same slander or an exaggerated version thereof by the wife to some third person, for which the husband would be equally answerable in damages and which would be easier to prove;" adding that, in his opinion, such a communication would enjoy the same privilege as that which is supposed to attach to matters divulged by a Roman Catholic to his priest, under the seal of confession: *Odgers on Libel and Slander*, 153. But the Supreme Court of California, in the principal case, takes a different view; S. C., 28 AMERICAN LAW REGISTER, 125; and this opinion is somewhat strengthened by a decision of the Supreme Court of North Carolina, in a case decided in the same month.

This was a prosecution for criminal slander under the North Carolina code, for charging a woman with incontinency. The words were spoken to the prosecuting witness, the defendant's wife being a short distance away. On the trial, the defendant's counsel asked for an acquittal, on the ground that the "legal entity" of the wife being merged, "husband and wife are one person," and, therefore, words spoken by the husband in the presence of the wife are protected; and "assuming that the supposed defamatory words were spoken in the hearing of a third person," the wife is not such a person, within the meaning of the law; and if she were such a third person, the fact that she was "a short distance off," is not sufficient to prove that she heard the defamatory words. The Court overruled the objection; and, on appeal, its ruling was sustained, DAVIS, J., saying: "We are unable to see the force of this objection. The words spoken were not of a gentle and confidential character between husband and wife, but spoken in a loud tone, which could have been heard a long way off; and, besides, it appears from the testimony in behalf of the defendant, that a negro woman was near, and that the witness, John Lytle, was in hearing, though he testified that the language used by the defendant was different from that charged by the prosecutrix:" *State* v. *Shoemaker* S. Ct. N. C., Dec. 18, 1888. 28 AMERICAN LAW REGISTER, 190.

Defamatory words are not actionable until they are published, and by publication is meant the putting of the slander before one or more persons other than the plaintiff. To slander a person to his face, is not actionable, unless some one overhears it; nor is it, to send an enclosed letter, containing de-

famatory matter, to the plaintiff: Cooley on Torts, 193; *Lyle* v. *Clason* (1804), 1 Cai. (N. Y.) 581; *Spaits* v. *Poundstone* (1882), 87 Ind. 522; *McIntosh* v. *Matherly* (1848), 9 B. Mon. (Ky.) 119; *Broderick* v. *James* (1871), 3 Daly (N. Y.) 481; *Desmond* v. *Brown* (1871), 33 Iowa, 13. *Aliter*, where one is prosecuted criminally and not sued: *State* v. *Avery* (1828), 7 Conn. 266. A proprietor of a newspaper cannot be found to have published a libel, unless it is proved to have been read, as well as printed and sold: *Prescott* v. *Tousey* (1884), 50 N. Y. Super. Ct. 12.

But to constitute a publication the libel need not be made known to the public generally; it is sufficient if it be made known to a single third person: *Adams* v. *Lawson* (1867), 17 Grat. (Va.) 250.

To shout defamatory words where no one can hear them, is not a publication of them; but if any one is within hearing, it is no defence that the defendant did not intend them to be heard by the person: *Shepherd* v. *Whitaker* (1875), L. R. 10 C. P. 502. Nor is it a publication to speak them to the person defamed, even though the place is a public one, if no other person hears them: *Sheffill* v. *VanDeusen* (1859), 13 Gray (Mass.) 304. It is no publication of a slander to speak it in a foreign language, which no one present understands: *Keene* v. *Ruff* (1855), 1 Iowa 482. To prove the publication of a libel written in German, it must be shown that it was read by some one other than the plaintiff who understood German: *Mielenz* v. *Quasdorf* (1886), 68 Iowa 726; *K.* v. *H.* (1866), 20 Wis. 239. But this does not apply to a libel printed in a foreign language: *Palmer* v. *Harris* (1869), 60 Pa. 156.

The publication must be made by the defendant. If the party to whom the slanderous words are spoken, or the written libel is sent, being the one defamed, gives it to the world, the defendant is not responsible: *Fonville* v. *M'Nease* (1838), Dudl. (S. C.) 303. But the words are actionable, although spoken when no one else is present, to one who knows them to be false and who does not repeat them until after action is brought: *Marble* v. *Chapin* (1882), 132 Mass. 225. And an injunction of secrecy by the defendant to witness, is no defence: *McGowan* v. *Manifee* (1828), 7 T. B. Mon. (Ky.) 314.

To have a libelous writing in one's possession is no publication: Odgers, *152; neither is it to post up a libelous placard, if it is taken down before any one sees it: Odgers, *153. A defamatory writing is no libel, so long as it remains in the possession of the composer and is seen by no one else; but if he keeps such a paper in his possession, he must at his peril see that it does not fall into the hands of others; if it does, the publication is in law attributable to him as the party who originated the wrong and was the means of its becoming injurious: Cooley on Torts, 281. But Mr. Odgers says (page 152): "If I compose or copy a libel and keep the manuscript in my study, intending to show it to no one, and it is stolen by a burglar and published by him, it is submitted that there is no publication by me, either in civil or criminal proceedings. But it would be a publication by me, if through any default of mine it got abroad, whether through my negligence or folly," citing *Weir* v. *Hoss* (1844), 6 Ala. 881, which seems to hold that a publication without the author's consent, is no publication as to him.

It is a publication to deliver it to a person who would necessarily read it, even though it is not proved that in the particular case, he did read it; as delivering a newspaper to a revenue commissioner to stamp it: *R.* v. *Amphlet*

(1825), 4 B. & C. 35; or a manuscript to a printer: *Baldwin* v. *Elphinston* (1775), 2 W. Bl. 1037; *Trumbull* v. *Gibbons* (1818), 3 City H. Rec. (N. Y.) 97; or to send a libel by telegraph: *Whitfield* v. *R. Co.* (1858), E. B. & E. 115; *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393; or by postal card: *Robinson* v. *Jones* (1879), 4 L. R. Ir. 391. Where A., by mistake, directed and posted a libel on B. to B's employer, instead of to B., this was held a publication: *Fox* v. *Broderick* (1864), 14 Ir. C. L. 453. So where A. wrote a libelous letter to B., but showed it to C. before posting it: *Snyder* v. *Andrews* (1849), 6 Barb. (N. Y.) 43; *M'Combs* v. *Tuttle* (1840), 5 Blackf. (Ind.) 431. So, where the defendant knew that the plaintiff's letters were always opened by his clerk in the morning and sent a libelous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk, lawfully and in the usual course of business, this was held a publication by the defendant to the plaintiff's clerk: *Delacroix* v. *Thevenot* (1817), 2 Stark. 56. So, where the defendant, before posting the letter to the plaintiff, had it copied, this was held a publication to his own clerk who copied it: *Keene* v. *Ruff* (1855), 1 Iowa 482. Where, however, though a third person may have had an opportunity of reading the libel, if he actually did not, it is no publication: Odgers, *153. It is no publication by one who picks up and delivers a sealed letter, the contents of which are unknown to him: *Fonville* v. *M'Nease* (1838), Dudl. (S. C.) 303. So, where a person wrote a letter and gave it to another to deliver folded, but not sealed, and the messenger delivered it to the plaintiff without reading it, it was held no publication: *Chutterbuck* v. *Chaffers* (1816), 1 Stark. 382; *Day* v. *Bream* (1837), 2 Moo. & R. 54. A communication of a slander on a man to his wife, is a publication: *Wenman* v. *Ash* (1853), 13 C. B. 836; or to any member of his family: *Miller* v. *Johnson* (1875), 79 Ill. 58. It is a publication to give it to the agent of the plaintiff: *Brunswick* v. *Harmer* (1849), 14 Q. B. 185. As soon as the manuscript of a libel has passed out of the defendant's possession and control, it is published as to him. Thus a letter is published as soon as posted, and in the place where it is posted, if it is ever opened anywhere, by any third person: *Ward* v. *Smith* (1814), 6 Binn. (Pa.) 749; *Clegg* v. *Laffer* (1833), 3 Moo. & Sc. 727; *Warren* v. *Warren* (1834), 1 C. M. & R. 250; *Shipley* v. *Todhunter* (1836), 7 C. & P. 680.

The publication of a libel is sufficiently proved when it appears that a letter in the handwriting of the defendant, containing the libel, was found in the house of a neighbor of the person libeled, and by such neighbor and a third person opened and read: *Swinbdle* v. *State* (1831), 2 Yerg. (Tenn.) 581; A letter stating that the writer had heard of a slanderous report, is admissible in evidence to prove the circulation of the report, and may be read for that purpose, the handwriting of the person being proved; but it is not admissible to prove that the defendant had propagated the report: *Schwartz* v. *Thomas* (1795), 2 Wash. (Va.) 167. Evidence that a newspaper came from the defendant's office and was one copy of an edition of the same date, is proof of publication: *State* v. *Jeandell* (1854), 5 Harr. (Del.) 475.

Distributing newspapers containing libelous matter and receiving money for them by an agent, is sufficient evidence of publication: *Respublica* v. *Davis* (1801), 3 Yeates (Pa.) 128. Where a witness swore that he was a printer, and had been in the office of the defendant where a certain paper was printed, and saw it printed there,

and the paper produced by the plaintiff was, he believed, printed with the types used in the defendant's office, it was held *prima facie* evidence of the publication by the defendant: *Southwick* v. *Stevens* (1813), 10 Johns. (N. Y.) 443. So, where the libel was published in a newspaper printed in another State, but which usually circulated in a particular county in Massachusetts, and the number containing the libel was actually received and circulated in the given county, this was held conclusive evidence of a publication within the county: *Commonwealth* v. *Blanding* (1825), 3 Pick. (Mass.) 304.

The entry of the resolution of excommunication from membership in a church on the minute book of the session, and the exhibition of it to the members for their signatures, does not constitute a publication: *Landis* v. *Campbell* (1883), 79 Mo. 433. Where, pending prosecution of a criminal charge against A., defendant wrote to A.'s father, stating that he was reliably informed that the prosecuting attorney had been bribed to release A. on consideration of the father employing him on a contingent fee in a suit against defendant, this was held a sufficient publication: *Young* v. *Clegg* (1883), 93 Ind. 371.

Where the only publication is one brought about by the plaintiff's own act, it has been held that this is not sufficient to give the right of action; on the principle of the maxim, *volenti non fit injuria*. Damages cannot be recovered for the repetition of slanderous words spoken by another, whether true or false, when such words were repeated by the defendant, at the request of the plaintiff: *Haynes* v. *Leland* (1848), 29 Me. 233; *Sutton* v. *Smith* (1850), 13 Mo. 120; *King* v. *Waring* (1808), 5 Esp. 13; *Smith* v. *Wood* (1812), 3 Camp. 323; *Warr* v. *Jolly* (1834), 6 C. & P. 497; *Weatherston* v. *Hawkins* (1786), 1 T. R. 110; *Hopwood* v. *Thorn* (1849), 8 C. B. 291; *Fonville* v. *M'Nease* (1838), Dudl. (S. C.) 303; *Nott* v. *Stoddard* (1865), 38 Vt. 25; *Heller* v. *Howard* (1882), 11 Bradw. (Ill.) 554. *Contra*, *Duke of Brunswick* v. *Harmer* (1849), 14 Q. B. 185; which holds that where the words have been previously uttered, suit may be brought on a repetition sought by plaintiff. And in *Griffiths* v. *Lewis* (1845), 7 Q. B. 60, Lord DENMAN, C. J., said: "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make inquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real question comes to this, does the utterance of slander once, give the privilege to the slanderer to utter it again, whenever he is asked for an explanation? It is the constant course when a person hears that he has been calumniated, to go with a witness to the party who he is informed has uttered the injurious words and say, "Do you mean, in the presence of witnesses, to persist in the charge you have made?" And it is never wise to bring an action for slander, unless some such course has been taken. But it never has been supposed that the persisting and repeating the calumny in answer to such a question, which is an aggravation of the slander, can be a privileged communication; and in none of the cases cited has it ever been so decided." Where, within six months before suit brought, the defendant said concerning the words alleged to be actionable, but which were barred by the statute, "I never denied what I have said and I will stand up to it," this was held not a repetition of what he had previously said, and that an action could not be sustained thereon: *Fox* v. *Wilson* (1856), 3 Jones (N. C.) 485. So, where the plaintiff, after receiving a libelous letter from the defen-

dant, sent for a friend of his and also for the defendant, and then repeated the contents of the letter in their presence, and asked the defendant if he wrote that letter, the defendant, in the presence of the plaintiff's friend, admitted that he had written it, this was held no publication by the defendant to the plaintiff's friend: *Fonville* v. *M'Nease* (1838), Dudl. (S. C.) 303.

The testimony given by a witness on a trial, in which he acknowledged the uttering of certain words to be slanderous, cannot be proved as an admission, in a subsequent action for slander brought against him: *Osborn* v. *Forshee* (1871), 22 Mich. 209.

Proof that the words were spoken to plaintiff, or in his presence, need not be made; it suffices to show that they were spoken to a different person: *Ware* v. *Cartledge* (1854), 24 Ala. 622. Where a letter containing a libel is sent sealed, and the writer subsequently states in the presence of witnesses that he had got a certain person to write it for him, and that he had signed his name to it and kept a copy, and also states what the contents were, but does not produce the copy, this is a sufficient publication: *Adams* v. *Lawson* (1867), 17 Grat. (Va.) 250.

The moral or intellectual character of the person in whose hearing the slander is uttered, is irrelevant: *Sheffill* v. *Van Deusen* (1859), 13 Gray (Mass.) 304.

JOHN D. LAWSON.

San Francisco, Cal.

Communications to attorneys-at-law physicians and clergymen are often privileged, when made in the course of a specific retainer or confession: see Leading Article, January, 1889 (xxviii. A. L. R. 1), and State Statutes (Id. 16–21).

Communications to a prosecuting attorney by a person enquiring whether the facts communicated make out a case of larceny for a criminal prosecution, are absolutely privileged: *Vogel* v. *Gruaz*, 110 U. S. 311 (abstract of same case, xxiii. A. L. REG. 273).

So, communications to a body of citizens, respecting the character of a nominee for judicial office, are privileged, unless there is actual malice: *Briggs* v. *Garrett*, xxv. A. L. R. 493; *Spiering* v. *Andrae*, xviii. Id. 186; though, if false, and published in a newspaper, the editor cannot invoke the privilege: *Bronson* v. *Bruce*, xxv. Id. 509, and note.

Communications made during an interview, sought by the accused and his friend, with the defendant, are privileged: *Billings* v. *Fairbanks*, xxiii. A. L. REG. 549.

There is no privilege attached to slanderous words spoken privately to one who knows them to be false and does not repeat them until after the action is brought: *Marble* v. *Chopin*, xxii. A. L. REG. 78.

Privilege depends upon public policy: note to *Munster* v. *Lamb*, xxiii. A. L. REG. 19–25. J. B. U.

Supreme Court of Kansas.

SWITZER v. CITY OF WELLINGTON.

A city cannot be garnisheed and made liable to pay a creditor of its creditor, without express statutory provision.

This exemption is based entirely upon grounds of public policy, as otherwise the usefulness and power of municipal corporations, in the discharge of their functions, would be impaired, and the municipalities subjected to duties, liabilities and expenditures, merely to promote private interest and convenience.

The Kansas statutes relating to garnishments and cities of the second class, do not authorize the creditor of a municipality's creditor to attach moneys due and owing by the municipal corporation.

Error to the District Court of Sumner County.

Action against a city to recover a sum attached by garnishee process, under Section 54*a*, c. 81, Comp. Laws of 1879 (page 706 of Comp. Laws of 1885), which provides—

"That in all personal actions arising upon contract, before justices of the peace, if the plaintiff, his agent or attorney, shall file with the justice, at the time of or after the commencement of suit, an affidavit that he has good reason to believe, and does believe, that any corporation or person to be named, and within the county where the action is brought, has property, money, goods, chattels, credits, and effects in his hands, or under his contract [control], belonging to the defendant, or that such corporation or person is anywise indebted to the principal defendant (naming him), is justly indebted to the plaintiff in a given amount over and above all legal set-off, and that the plaintiff has good reason to, and does, believe that he will lose the same unless a garnishee summons issue to the aforesaid person, a garnishee summons shall be issued and personally served, in the same manner as an ordinary summons, and from the time of such service the garnishee shall stand liable to the plaintiff for all property, money, and articles in his hands, or due from him to the defendant."

John M. Graham and *Isaac G. Reed*, for the plaintiff in error.

W. H. Stafflebach and *Lawrence & Ferguson*, for the defendant in error.

HOLT, C., November 10, 1888. On January 8, 1883, H. Switzer, the plaintiff in error, brought an action in a justice's court against James Cronin, and recovered judgment by confession on the 12th day of January. At the same time, he served a garnishee process upon P. A. Wood, mayor of the city of Wellington. Upon the 22d of January, the mayor answered under oath that the city was indebted to James

Cronin in the sum of $45.88. The city failing to pay this amount, the plaintiff brought this action to recover it. Judgment was rendered for the defendant in the justice's court, and the case was taken to the Sumner district court on error, where the judgment was reversed, and the case held for trial in said court. Upon trial, judgment was again rendered for the defendant.

It appears that the city of Wellington was indebted to Cronin, on a contract for work upon the streets, but it was agreed in open court, that the only question sought to be presented here, should be whether or not a municipal corporation should be required to answer as a garnishee in a justice's court. The plaintiff contends that Section 54*a*, c. 81, Comp. Laws, 1879, authorizes such a proceeding. It is as follows: [as above.]

It is contended that the phrase "any corporation or person," includes a city of the second class; that the term "corporation" is used without limitation, and would embrace not only private, but public corporations. We think that the term "corporation," as used in this section, has reference solely to private corporations, organized for private purposes, and does not include municipal corporations. Cities are a part of the government, and should not be required to become involved in litigation in which they have no interest. This exemption from garnishee process is based entirely upon the ground of public policy. The reasons given by different courts are numerous; among others, that it would impair the usefulness and power of such corporations in the discharge of their functions. It would draw cities into litigation, and occupy the time of their officers in expensive and vexatious suits in which they had no interest, and would compel them to expend the money of the people and the time of their officials on a matter wholly foreign to their creation. It might impede public improvements, and the execution of contracts in which the public would be interested. In *Merwin* v. *City of Chicago* (1867), 45 Ill. 133, the Court says: "But, in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all cases, and the exemption from liability be allowed to depend, in each case, upon the character of the

indebtedness, we shall leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury, in defending suits, in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for private purposes. But a municipal corporation is part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjugated to duties, liabilities, or expenditures, merely to promote private interest or private convenience." *Wallace* v. *Lawyer* (1876), 54 Ind. 501; *McDougal* v. *Hennepin Co.* (1860), 4 Minn. 184; 1 Dillon on Mun. Corp., § 100; *State* v. *Eberly* (1882), 12 Neb. 616; *Hawthorn* v. *City of St. Louis* (1847), 11 Mo. 59; *Erie* v. *Knapp* (1857), 29 Pa. 173; *Mayor, etc.*, v. *Rowland* (1855), 26 Ala. 498; *Mayor of Baltimore* v. *Root* (1855), 8 Md. 95; *Burnham* v. *City of Fond du Lac* (1862), 15 Wis. 193; *Buffham* v. *City of Racine* (1870), 26 Id. 449; *School-Dist.* v. *Gage* (1878), 39 Mich. 484; *McLellen* v. *Young* (1875), 54 Ga. 399; Drake on Attachm. § 516; 2 Wade on Attachm. §§ 345, 419; Waples on Attachm. & Garn. 236 *et seq.* See, also, *McCubbin* v. *Atchinson* (1873), 12 Kan. 166, and notes of reporter on pages 169–70. The authorities are not entirely uniform. *Contra: City of Newark* v. *Funk* (1864), 15 Ohio St. 462, in which the court held that a municipal corporation could be garnisheed. The statute of Ohio provides that any claims or choses in action, due or to become due to the judgment debtor, and all money, goods and effects, which he may have in the hands of any person, body politic or corporate, may be made subject to the payment of a judgment: Rev. Stat. Ohio, ed. 1884, § 5464. Also, *Wilson* v. *Lewis* (1872), 10 R. I. 285; *Bray* v. *Town of Wallingford* (1850), 20 Conn. 416; *Adams* v. *Tyler* (1876), 121 Mass. 380.

Plaintiff contends, if this were the ordinary and fair interpretation of section 54*a*, the defendant has waived it by the answer of the mayor to the garnishee process; and cites *Clapp* v. *Walker* (1868), 25 Iowa 315. That authority is not applicable in this case. That action was brought against a school district, and the district admitted an indebtedness for a part of the amount claimed, and denied its indebtedness for any greater sum. A trial was had, and verdict set aside; and, after the evidence was all introduced in the second trial, the Court was asked to instruct the jury that a municipal corporation could not be garnisheed, and therefore was not liable. In the [present] action of *Switzer* v. *Cronin*, the mayor, in response to garnishee summons, answered simply that the city was owing Cronin $45.88. When this action was brought against the city, it denied its liability at once, and has contested this action, on the ground that, being a municipal corporation, it was not answerable to Switzer for any amount it might be owing Cronin. The plaintiff calls our attention to section 102, c. 18, Comp. Laws, relating to cities of the first class, which is: "Lands, houses, moneys, debts due the city, and property, and assets of every description belonging to any city under this act, shall be exempt from taxation, execution, and sale, and such cities shall not be required to answer as garnishee in any action." And also to section 104, c. 19, relating to cities of the second class, as follows: "All lands, houses, moneys, debts due the city, and property and assets of every description, belonging to any city or municipal corporation, * * * shall be exempt from taxation." The plaintiff contends that because the clause, "and such cities shall not be required to answer as garnishee in any action," is omitted in section 104 of chapter 19, it was intended that cities of the second class should be required to answer as garnishee, and that under the ordinary rules of construction, cities of the first class only were intended to be exempt. We concede the force of this argument, but it does not necessarily follow, because it was inserted in the law governing cities of the first class, that the rule would have been otherwise if it had been left out. The acts relating to cities of the first and second class were enacted at different times; the one concerning cities of the second class in 1872,

and the other in 1881. We cannot say that the omission from the earlier act was intentional. We believe the rule to be, before a city is required to answer in garnishee proceedings, there must be an express provision of the statute compelling them to do so. This being the law, its omission would not justify the inference of plaintiff. The rule of construction contended for by plaintiff is not clearly applicable to the statutes cited and compared, and we think such construction should yield to the more important question of public policy; and that no city, without an express provision of the statute, should be drawn into litigation in which it has no interest, and wholly foreign to the purposes of its creation, and the money of the people expended, and the time of its officials devoted to matters of no public interest or benefit. We therefore recommend that the decision of the court below be affirmed.

Per Curiam. It is so ordered.

HORTON, C. J., and JOHNSTON, J., concur. VALENTINE, J., dissents.

Municipal corporations are, in many respects, part and parcel of the Government, and most attempts to garnishee them have been made for the purpose of reaching the salaries of the officials employed by them, in their governmental capacity. Now, it is settled that the salary of an officer of the United States cannot be attached: *Spalding* v. *Imlay* (1793), 1 Root (Conn.) 551; *Averill* v. *Tucker* (1824), 2 Cranch. (U. S. C. Ct.; D. C.) 544; *Buchanan* v. *Alexander* (1846), 4 How. (45 U. S.) 20. And there is the same unanimity with respect to the salaries of officers of particular States in the American Union: *Stillman* v. *Isham* (1835), 11 Conn. 124; *Wicks* v. *Branch Bank* (1847), 12 Ala. 594; *In re Meekin* v. *State* (1849), 9 Ark. 553; *Bank of Tennessee* v. *Dibrell* (1855), 3 Sneed (Tenn.) 379; *Dobbins* v. *Or. & Al. R. R. Co. & Super. of the W. & A. R. R. Co., Garnishee* (1867), 37 Ga. 240; *Bulkley* v. *Eckert* (1846), 3 Pa. 368; *Tracy* v. *Hornbuckle* (1871), 8 Bush (Ky.) 336.

Only two cases have been found, in which the salary of a county official was sought to be reached, and both arose in Massachusetts; in the first one, it was held not to be attachable: *Chealy* v. *Brewer* (1811), 7 Mass. 259; but a different view of the subject was taken in the same State sixty-five years later: *Adams* v. *Tyler* (1876), 121 Id. 380. With respect to the salaries of city officials, out of ten cases, seven hold that these may not be attached: *Bradley* v. *Richmond* (1834), 6 Vt. 121; *Hawthorn* v. *St. Louis* (1847), 11 Mo. 59; *Mayor &c., of Mobile* v. *Roland & Co.* (1855), 26 Ala. 498; *Mayor, &c., of Baltimore* v. *Root* (1855), 8 Md. 95; *Hoyt* v. *Experience* (1858), 26 Ga. 113; *Clark* v. *Lee's Assignee* (Ct. App. Ky., 1875), 12 Alb. L. J. 391; *Walker* v. *Cook* (1880), 129 Mass. 577; and three that they may be attached; *Speed* v. *Brown* (1849), 10 B. Mon. (Ky.) 108; *Smoot* v. *Hart*

(1858), 33 Ala. 69; *Wilson* v. *Lewis* (1872), 10 R. I. 285.

The case of *Hadley* v. *Peabody* (1859), 13 Gray (Mass.) 200, was an attempt to attach a teacher's salary, which was payable quarterly. The process was served in the middle of the quarter. The Court said, "The plaintiff contends that the city must be charged for the part of a quarter's salary, proportioned to that part of the time which had elapsed at the time since the beginning of the quarter. * * * * It was not a debt, it might not become a debt; the contract was entire, and until completed on the part of the teacher, nothing was due. We think this point is settled by authorities." The intimation is plain here, that, if the salary of a whole quarter had been due, the attachment would have been sustained.

Speed v. *Brown* (1849), 10 B. Mon. (Ky.) 108, was an attempt to reach the salary due a city Marshal. A bill was filed for that purpose in equity. The Court said, "It seems to us that, as the city is a corporation which may be sued, a creditor unable by execution at law to coerce his debt, may subject to that debt the money actually due and owing from the city to the officer, for services, at the time of the commencement of the suit fully rendered, or where the money has been set apart for his use, and subject immediately to his demand." But it was held not to be practicable so to collect a future salary, because that might drive the debtor from the public service.

Seven cases have also been found in which it is not clear whether official salaries were involved or not; in four of them, *McWhidden* v. *Drake & Portsmouth* (1829), 5 N. H. 13; *Ward* v. *County of Hartford* (1838), 12 Conn. 404; *Bray* v. *Wallingford* (1850), 20 Id. 416; *Heebner* v. *Chave* (1847), 5 Pa. 115, the attachment was sustained. In three, *Erie* v. *Knapp* (1857), 29 Pa. 173; *McDougall* v. *Supervisors of Hennepin Co.* (1860), 4 Minn. 184; *Merwin* v. *Chicago* (1867), 45 Ill. 133, it was not. If we confine ourselves to those cases in which it is certain that municipal salaries were in question, we see that the decisions are more than two to one in favor of their exemption from garnishment.

As the law in question is judicial and not statutory, when it comes to be applied for the first time in any jurisdiction, the authorities are rightly to be considered, not with reference to their number alone, but also, and perhaps mainly, with reference to the strength and conclusiveness of their reasoning. And this reasoning may, for convenience, be considered under three heads, the first of which has been based on the assumption that, in the language of *Bradley* v. *Richmond* (1834), 6 Vt. 121, "the phraseology of the act implies personal privileges." Now, not only are "personal privileges" implied in attachment laws—as, indeed, in what law are they not, save in laws having reference solely to official status?—but, in most of them, the word "person" is actually applied to the garnishee. And the question, therefore, is, did the legislature intend to include a municipal corporation by that word? A strong side light is shed upon the question by cases in which ordinary corporations have sought to evade responsibility on the ground that they were not "persons," within other statutes than those of attachment.

Blackstone's definition of "person" appears to have been framed expressly for the purpose of including corporations. He says: "Persons are divided by law into either natural persons, or artificial; natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called cor

porations or bodies politic:" 1 Bl. Comm. 123.

So, an American Judge has said that it does "not require the aid of the legislature to prove that the word *person* in a statute may extend to a corporation as well as to a natural person. That a State is a corporation cannot be doubted. It is a legal being, capable of transacting some kinds of business, like a natural person, and such a being is a corporation:" *State of Indiana* v. *Woram* (1843), 6 Hill (N. Y.) 33, and again: "The word person, in its legal sense, is a generic term and was intended to include artificial as well as natural persons;" *Douglas* v. *Pac. M. St.* (1854), 4 Cal. 304. Yet, notwithstanding the self-evident accuracy of these propositions, the ingenuity of corporation counsel has been exhausted in the repeated efforts to save their clients from the operation of statutes, which, in terms, applied to "any person." Thus, it had to be expressly decided, that a railroad company was a "person" within the Statute of Limitations: *Olcott* v. *Tioga R. R.* (1859), 20 N. Y. 210; *Thompson* v. *Tioga R. R.* (1861), 36 Barb. (N. Y.) 79; and could appeal as a "person" owning land: *People* v. *May* (1858), 27 Barb. (N. Y.) 238; and might, as a "person," be sued in the county where a trespass was committed: *Bastee* v. *Houston, &c., R.R.* (1871-2), 36 Tex. 648; and was a "person" within a statute relating to taxation: *Louisville & Nashville R. R.* v. *Commonwealth* (1866), 1 Bush (Ky.), 250, and this was afterwards extended to municipal corporations: *Wallace* v. *Mayor, &c., of New York* (1859), 2 Hilt. (N. Y.) 440; and it was held that the bonds of a life insurance company were "personal estate," within the meaning of such a statute: *Brit. Com. Life Ins. Co.* v. *Com. of Taxes* (1865), 31 N. Y. 32; s. c. (1864), 18 Abb. Prac. 118, and (1864), 1 Abb. App. Dec. 199; and that a bank was within such a statute, where the word used was "inhabitants:" *Ontario Bank* v. *Bunnell* (1833), 10 Wend. (N. Y.) 186; and so with a manufacturing company, where the words were "persons or associations:" *Parker Mills* v. *Com. of Taxes* (1861), 23 N. Y. 242; and it was also held that such a company might, as a "person," give its promissory note, and was within the Statutes of 3 & 4 Anne: *Mott* v. *Hicks* (1823), 1 Cow. (N. Y.) 513. See, also, *State of Indiana* v. *Woram* (1843), 6 Hill (N. Y.) 33, and within the protection given to "persons" by the Act of Congress of April 20, 1871: *N. W. Fertilizing Co.* v. *Hyde Park* (1873), 3 Biss. (U. S. C. Ct., N. D. Ill.) 480-2; and that a bank was a "person," within a statute against usury: *Thornton Bank of Washington* (1830), 3 Pet. (28 U. S.) 36. See, also, *Com. Bk. of Manchester* v. *Nolan* (1843), 7 How. (Miss.) 508; *Grand Gulf Bank* v. *Archer* (1847), 8 S. & M. (Miss.) 151; and that a steamboat company was a "person" within an Act for the commencement of process: *Douglas* v. *Pac. M. St.* (1854), 4 Cal. 304, and was a carrier, responsible as a "person" for injury: *Chase* v. *Amer. Steamboat Co.* (1871), 10 R. I. 79; and that one telegraph company could, as a "person," sue another for failure to send a message: *U. S. Tel. Co.* v. *W. U. Tel. Co.* (1865), 56 Barb. (N. Y.) 46-54. And that a fire insurance company was restrained, as a "person," from unlawfully exercising a franchise: *People* v. *Utica Ins. Co.* (1818), 15 Johns. (N. Y.) 358 (marg.); and was a "living person" within a statute allowing the examination of parties as witnesses: *La Farge* v. *Exchange Fire Ins. Co.* (1860), 22 N. Y. 352; and a railroad company was the same: *Field* v. *N. Y. Cen. R. R.* (1859), 29 Barb. (N. Y.) 176. And that a newspaper publishing company was a

"person" within the meaning of the U. S. Bankruptcy Laws: *In re Oregon Bulletin Co.* (1875), (U. S. D. Ct., D. Or.) 13 Nat. Bank. Reg. 199; and that a church was a "person" which could recover under a statute, for property injured in a riot: *St. Michael's Church* v. *County* (1847), Bright. (Pa.) 121. And that a university was a "person" which could enter land under a statute: *State* v. *Nashville Univ.* (1843), 4 Humph. (Tenn.) 157.

So much for "miscellaneous" cases. In at least two instances, it has been held that an ordinary "business" corporation is not a "person" within the meaning of the attachment laws. The first is that of the *President, &c., of Union Turnpike Road* v. *Jenkins* (1806), 2 Mass. 37, which was an attempt to attach money in the hands of "The New England Marine Insurance Co." The Court held that "an aggregate corporation cannot be summoned as trustee," for which opinion it gave no reason. In 1832, corporations were made liable to process of foreign attachments in Massachusetts, and the Public Statutes provide that "All personal actions, except actions of replevin and actions of tort for malicious prosecution, for slander, either by writing or speaking, and for assault and battery, may be commenced by trustee process, and any person or corporation may be summoned as trustee of the defendant therein; but a person who is not a resident of the commonwealth, or a corporation which is not established under its laws, shall not be so summoned, unless he or it has a usual place of business in the commonwealth" (ed. 1882, chap. 183, § 1, page 1052.

McQueen v. *Middletown Mfg. Co.* (1819), 16 Johns. (N. Y.) 5 (marg.) was an attempt to attach property of a foreign corporation. The law applied to the "estate of every debtor, residing out of the State." The Court said: "It is very certain that no attachment can be issued under this act against domestic corporations, for they cannot conceal themselves nor abscond. The Court have no doubt, from a view of the whole act, that the Legislature intended to authorize proceedings under it against natural persons only. The twenty-first section supposes that the person giving the security to appear and plead to any action to be brought, would, if within the State, be subject to a suit; and we think a foreign corporation never could be sued here. The process against a corporation must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another State were to come within this State, he would not represent the corporation here; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived this character; and though, possibly, it would be competent for a foreign corporation to constitute an attorney to appear and plead to an action instituted in another jurisdiction, we are clearly of the opinion that the legislature contemplated the case of a liability to arrest, but for the circumstance that the debtor was without the jurisdiction of the process of the courts of this State; and that the act, in all its provisions, meant that attachments should go against natural, not artificial, or mere legal entities. The first section speaks of persons, and throughout the act, natural persons only were intended to be subjected to its provisions. It is true that there are cases in which corporate property has been held liable to be taxed under acts which subject the property of *inhabitants* to taxation; but in all such cases, the tax operated *in rem*, on the estate; and it has been held, that whoever resided on the property represented in that respect the corpora-

tion, and, in the view of the act, were inhabitants; but it would not be correct to say abstractly, that the corporation, or mere legal entity, was an inhabitant. The statute under consideration being an innovation on the common law, it ought not to be carried further, by construction, than the plain and manifest intention of the Legislature indicates." Of this, it was said in *S. C. R. R. Co.* v. *McDonald* (1818), 5 Ga. 531, "The reasoning of the Court in that case is not very satisfactory. And, moreover, the provisions of the Statute of New York, upon which that decision was made, are somewhat different from those of our own act." And the weight of authority is decidedly opposed to this view. Thus, in *People* v. *Briggs* (1872), 50 N. Y. 553, it was said that the word "person," in the attachment law, included corporations, and the same was held in *Libbey* v. *Hodgdon* (1838), 9 N. H. 394. In *Planters' & Merchants' Bank* v. *Andrews* (1839), 8 Por. (Ala.) 404, the Court said: "The argument that *natural persons* are alone entitled or liable to the process of attachment, cannot be maintained. It is true that the statute would seem to refer to such persons only, yet it is well settled that the term "person," in a statute, embraces not only *natural*, but *artificial persons;* unless its language indicates that it was employed in a more limited sense, or the subject matter of the act leads to a different conclusion. In *S. C. R.R. Co.* v. *McDonald* (1848), 5 Ga. 531, it was held in an elaborate opinion, that a foreign corporation was a "person" within the meaning of the attachment laws. The Court said: "Corporations are to be deemed and considered as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in the statutes." And again, "Foreign corporations are, equally with natural persons, entitled to the remedy by attachment in our courts—the right and the liability ought to be reciprocal," and the Court called attention to a case already cited (*Benster, Garnishee* v. *Farmers' Bank* (1838), 12 Pet. (37 U. S.) 102; see opinion on page 134, n.), wherein it was held that a corporation was a "person" within the meaning of the provisions of a Federal statute giving a preference to the United States in the distribution of the effects of revenue officers, "or other persons hereafter becoming indebted to the United States:" *Balto. & Ohio R. R. Co.* v. *Gallahue's Ad.* (1855), 12 Grat. (Va.) 655. The Court said: "The only particular in which there is any departure from a literal compliance with the statute, is in regard to that provision of the seventeenth section which declares that when any garnishee shall appear, he shall be examined on oath. This clause was for the benefit of the plaintiff in the attachment. In the case of a corporation, he must receive an answer in the only mode by which a corporation can answer, under its corporate seal. In chancery, where, as a general rule, all answers must be verified by oath or affirmation, a corporation must answer in the same way, though, where a discovery is wanted, a practice has prevailed of making some of the officers defendants. The same result could be arrived at under the attachment law, by examining the officers as witnesses, if the plaintiff suggests that a full disclosure has not been made. This is an inconvenience to which he is subjected, growing out of the character of the garnishee, but furnishes no reason for exempting the corporation from being so proceeded against when all the other words in the statutes are sufficiently comprehensive to embrace artificial as well as natural persons. The mischief intended to be remedied applies as well to debts due by them as by individuals; and the circumstances in which they

are placed are the same as those of others embraced in the statute."

Finally, may be mentioned the case of the *Mineral Point R. R.* v. *Keep* (1859), 22 Ill. 9. This was an attempt to attach the property of a non-resident corporation. The Court called attention to the statutory provision that "the word 'person' shall be deemed to extend to and include bodies corporate, as well as individuals." The reasoning of the cases involving the construction of other than attachment laws, is precisely similar to that of those just cited; and the result of them all is, that a corporation is to be regarded as a "person" within the meaning of a statute, wherever it is possible so to regard it without implying an absurdity or an impossibility. If this appear too strong a statement, at least it cannot be denied that a corporation is *prima facie* a person, within the statutory meaning of that term, and that the burden is on him who seeks to exempt it from the operation of any act which applies to "persons," generally. And this observation holds with respect to the municipal corporation, as well as to other species of its *genus*. When, therefore, an act provides that any "person" may be garnisheed, to establish an exception in favor of a municipal corporation, on the ground that this word does not apply to such a body, it is necessary to adduce some conclusive reason why it cannot, in the nature of things, be so applied. Of course, if something were required of the "person" in any part of the act which a municipal corporation could not, from its peculiar constitution, perform, this requirement would be all sufficient. Only one attempt has been made to establish the exemption on this ground with any degree of detail. This was in the case of *Mayor, &c., of Mobile* v. *Roland & Co.* (1855), 26 Ala. 498, which was an attempt to attach the salary of a police officer, which was not due till towards the end of the month.

One section of the Code said that any "person" might be garnisheed, and another that "person" where used should include a corporation. The Court said, first, "This must be understood only of such provisions as will allow this signification to be given without violating their evident sense and meaning." And because it was provided in the attachment law that the garnishee must appear and answer upon oath, and might be orally examined, etc., it said, "these, and similar provisions which might be mentioned, clearly show that the statutes of garnishment cannot be applied to corporations, which from their impersonal, artificial character cannot be sworn; and cannot from the nature of things personally appear in court." Now, it would seem as if these objections were sufficiently met by the simple statement of the fact that, in equitable or in any other proceedings in our courts, municipal corporations do actually appear and are examined through their officers, without difficulty and without embarrassment. And it is evident moreover, that it applies to any corporation, ordinary as well as municipal, and would, if it were sound, exempt from almost every legal and equitable liability all the vast business corporations of the country.

So similar in language are the attachment statutes of the various States that this case may be said to exhaust the argument which might be derived from the provisions of any of them against including municipal corporations among the "persons" to which such statutes allude. In not one of them is any procedure demanded of the garnishee, which is not among the established and frequently exercised capacities of municipal, as of all other corporations. It follows that if the former are to be exempted from garnishment, it must be on other grounds than incapability.

J. T. RINGGOLD.

Baltimore, Md.

Supreme Court of Vermont.

HOWARD v. WITTERS.

A chattel mortgage, properly executed to secure a *bona fide* debt, takes precedence of a previous real estate mortgage, in which personalty is also mentioned and attempted to be mortgaged, without complying with the statutory requisites.

Where the possession of personal property is given to the buyer, and no reservation of title is made, there is no valid vendor's lien.

Exceptions from Chittenden County Court.

Trover for taking live stock and farming tools. At the trial, September Term, 1887, the court directed a verdict for the defendant.

The Revised Laws of Vermont, chapter 99 (edition of 1880, page 405), provide—

SEC. 1965. All personal property shall be subject to mortgage, agreeably to the provisions of this act.

SEC. 1966. A mortgage of such personal property shall not be valid against any person except the mortgagor, his executors and administrators, unless the possession of the property is delivered to, and retained by, the mortgagee, or the mortgage is recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the same, or if he resides out of the State, in the town in which the property is situated.

SEC. 1967. Each mortgagor and mortgagee shall make and subscribe an affidavit in substance as follows:

"We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the conditions thereof, and for no other purpose, and that the same is a just debt, due, and owing from the mortgagor to the mortgagee."

Which affidavit, with the certificate of the oath, signed by the authority administering the same, shall be appended to such mortgage, and recorded therewith.

SEC. 1970. Town clerks shall procure and keep a book of records for mortgages of personal property; they shall record therein any mortgage, transfer or discharge, and give a certified copy thereof when requested, on payment of their fees at the rate of ten cents a folio; shall certify the time when the same is received and recorded, and keep an alphabetical index of mortgagors and mortgagees, which record and index shall be open to public inspection.

SEC. 1972. A mortgagor of personal property shall not sell nor pledge such property mortgaged by him, without the consent of the mortgagee in writing upon the back of the mortgage and on the margin of the record thereof, in the office where such mortgage is recorded.

SEC. 1973. A mortgagor shall not execute a second or subsequent mortgage of personal property while the same is subject to a previously existing mortgage given

by such mortgagor, unless the fact of the existence of such previous mortgage is set forth in the subsequent mortgage.

And in relation to liens, chapter 100 provides—

SEC. 1992. No lien, reserved on personal property sold conditionally and passing into the hands of the conditional purchaser, shall be valid against attaching creditors, or subsequent purchasers without notice, unless the vendor of such property takes a written memorandum, signed by the purchaser, witnessing such lien, and the sum due thereon, and cause it to be recorded in the town clerk's office of the town where the purchaser of such property resides, if he resides in the State, otherwise in the town clerk's office of the town where the vendor resides, within thirty days after such property is delivered.

H. N. Deavitt and *O. P. Ray*, for plaintiff.

H. E. Powell, *W. L. Burnap* and *C. W. Witters*, for defendant.

POWERS, J. September 25, 1888. Lafave and wife conveyed a farm, together with the live stock and farming tools in question, to Chevalier, on the 20th day of May, 1882. This conveyance was by a warranty deed, and the personal property passed absolutely. To secure the purchase money, Chevalier, on the same day, executed an ordinary real estate mortgage to the plaintiff, to secure $1,000 advanced by the plaintiff to Mrs. Lafave for Chevalier, and another mortgage to Mrs. Lafave, to secure the balance of the purchase money, and in both said mortgages, attempted to mortgage said personal property. In December, 1883, Chevalier, who had been in possession of the farm and personal property since May 20, 1882, executed to the defendant a chattel mortgage of the personal property purchased of Lafave, as above stated, to secure a loan then made to him by the defendant. Before taking the chattel mortgage, the defendants examined the records of personal mortgages and liens in the town clerk's office, and found no incumbrance upon the property, and had no actual notice of the contents of the plaintiff's deed.

The mortgage of the personal property by Chevalier to the plaintiff was valid between the parties as a common-law mortgage; but as to subsequent purchasers, it created no lien upon the property. It lacked the formalities requisite under our statute to constitute a valid chattel mortgage as against the defendant. It was not valid as a vendor's lien. The title did not pass from Lafave to Chevalier conditionally, but abso-

lutely. Lafave did not undertake to retain the title when he parted with the possession, but conveyed both to Chevalier, and undertook to make security by way of mortgage back from Chevalier. This cannot be done as against innocent purchasers under our statute relating to vendor's liens. The defendant's mortgage was properly executed to secure a *bona fide* debt, and it must take precedence of the plaintiff's improperly executed one. The plaintiff and defendant are two innocent parties suffering from the default of Chevalier, but the plaintiff and his assignor made possible the contingency that has happened. The defendant's note, secured by her chattel mortgage, had been lost at the time of the trial, but it appeared that the officer making the sale had it at the time of sale, and his computation of the indebtedness secured by the mortgage was based upon it. If Chevalier owed the debt secured by the mortgage, the defendant had the right, under the statute, to seize the property, and sell it. If the note then or since happened to be lost, the seizure is none the less legal.

The judgment is affirmed.

Upon no division of the vexed subject of the rights of vendors, on which are based his remedies against the goods themselves, in sales of personal property, has there been more controversy than in regard to the scope of the seller's lien. English courts, as well as American, have found the greatest difficulty in determining whether the right of the seller to withhold or countermand delivery, in cases of failure to pay the price agreed on, is a right of lien, in the strict sense; or a recission of the contract; or a peculiar privilege which must be classed by itself.

In view of these differences of judicial opinion, the subject of the seller's lien presents elements of special interest to the profession, such as should render especially serviceable a consideration of this topic, based on all the authorities obtainable to date.

The general doctrine, authorizing the remedy, which, however familiar, must be outlined in the first instance, is to the effect that a vendor of chattels has, until delivery, a lien upon them for the price: *Clark* v. *Draper* (1849), 19 N. H. 419, 421; *Parks* v. *Hall* (1824), 2 Pick. (Mass.) 206, 214. [This principle applies, however, only to absolute sales, and not to conditional ones, per WILDE, J., *Barrett* v. *Pritchard* (1824), 2 Pick. (Mass.) 512, 515; in the case of conditional sales, the title to the goods remains in the vendor and the question of lien does not arise: see *Haskins* v. *Warren* (1874), 115 Mass. 514, 533; note to *Rawson M'f'g Co.* v. *Richards* (1887), 27 AMERICAN LAW REGISTER 591.]

[The application of the general right of lien upon undelivered personalty, is not prevented by taking a negotiable promissory note for the price, so long as the note remains in the hands of the vendor, ready for delivery to the vendee on the discharge of the lien: *Milliken*

v. *Warren* (1869), 57 Me. 46, 50; *Arnold* v. *Delano* (1849), 4 Cush. (Mass.) 33, 39. Delivery is the important feature, as it terminates the lien, though the purchase money is still unpaid and secured by a bond: *Beam* v. *Blanton* (1843), 3 Ired. Eq. (N. C.) 59, 62. "The law, in holding that a vendor who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt, or insolvent, and the vendor still retains the custody of the goods, or any part of them, or if the goods are in the hands of a carrier or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession by a stoppage *in transitu;* then his lien is restored and he may hold the goods as security for the price:" SHAW, C. J., *Arnold* v. *Delano, supra;* cited and followed by MILLER, J., *Thompson* v. *B. & O. R. R. Co.* (1867), 28 Md. 406. "Judges do not ordinarily distinguish between the retainer of goods by a vendor, and their stoppage *in transitu*, on account of the insolvency of the vendee; because these terms refer to the same right, only at different stages of perfection and execution of the contract of sale. If a vendor has a right to stop *in transitu*, *a fortiori* he has a right of retainer before any transit has commenced:" LOWRIE, C. J., *White* v. *Welsh* (1861), 38 Pa. 396, 420; *Griffiths* v. *Perry* (1859), 1 E. & E. (102 E. C. L.) 680; *M'Ewan* v. *Smith* (1849), 2 H. L. Cas. 309, 328; *Dodsley* v. *Varley* (1840), 12 A. & E. (40 E. C. L. 632.]

Where the goods are to be paid for on delivery, but the vendee refuses to pay for them on the completion of the delivery, the vendor has a lien for the price and may resume possession of the goods: *Palmer* v. *Hand* (1816), 13 Johns. (N. Y.) 434. It is further held in this case, that if during the delivery, or before it is completed, the vendee sells or pledges the goods to a third person, for a valuable consideration, without notice to the original vendor, the lien of the latter will not be affected, but he may recover the goods from the subsequent purchaser or vendee. (See below.)

[The question of delivery being, therefore, vital, the following expressions from a case where stoppage *in transitu* was denied because of delivery on board the consignee's own ship was held to be the end of the *transitus*.

The goods had been sold on credit and the consignee became insolvent before the ship and cargo reached the consignees. Two judges dissented on the question of the *transitus* being complete; that is, in the application of the principles laid down by the majority of the court in these words:]

"Actual delivery, then, I understand, to consist in the giving real possession of the thing sold, to the vendee or his servants, or special agents, who are identified with him in law, and represent him. Constructive delivery is a general term, comprehending all those acts which, although not truly conferring a real possession of the thing sold, have been held, *constructione juris*, equivalent to acts of real delivery. In this sense, constructive delivery includes symbolical delivery, and all those *traditiones fictae*, which have been admitted into the law as sufficient to vest the absolute property in the vendee, and bar the rights of lien and stoppage *in transitu;* such as marking and setting apart the goods as belonging to the vendee, charging him with warehouse rent, &c.": ROGERS. J., *Bolin* v. *Huffnagle* (1828), 1 Rawle (Pa.) 19–20; Winfield's Adjudged Words, 17, 138.

[Where a quantity of pig iron was

piled at the furnace and was pointed out by the seller to the agent of the buyer, for the purpose of constructive delivery, and, for the same purpose, was charged on the seller's books to the buyer, but no actual delivery was made, the seller does not loose his lien, and the buyer becoming insolvent, could direct its shipment to other persons, for the seller's own benefit: *Thompson* v. *B. & O. R.R. Co.* (1867), 28 Md. 396, 407. MILLER, J., in delivering the opinion of the court, said: "The law applicable to such a case as this prayer," for instructions to the jury, "presents, is very clearly and accurately stated by SHAW, C. J., in the case of *Arnold* v. *Delano* (1849), 4 Cush. (Mass.) 33, 38, 39. There is, says he, manifestly a marked distinction between those acts, which, as between vendor and vendee, upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price:" Id. 406. This is contrary to *Parks* v. *Hall* (1824), 2 Pick. (Mass.) 206, 212, where it was held to be generally immaterial whether the delivery be actual or constructive, and a constructive delivery, *according to the contract of sale*, was held to be sufficient to defeat the lien.]

Hence, in regard to the effect of constructive delivery upon the seller's lien, there is a diversity of statement, and even an apparent conflict of opinion. This is not to be wondered at when due note is taken of the different senses in which the term "delivery" is used in the law of sales, and of the uncertain scope of the distinction between actual and constructive delivery.

["The term *delivery* is used in the law of sales in very different senses. It is used, in turn, to denote transfer of title and transfer of possession; and where the parties have agreed, and the specific articles are appropriated and accepted, then, independently of the statute of frauds, it is often said, there is sufficient delivery to pass the title, although there be no transfer of possession. And this must be so, in order to be consistent with the lien, which remains to the vendor, for the price:" COLT, J., *Morse* v. *Sherman* (1871), 106 Mass. 430, 433, and citations there. Upon this statement of the law, an action for goods bargained and sold was sustained by evidence of a sale, "buyer's option, sixty days," at the Boston Mining and Stock Exchange, of shares of stock then in the possession of the seller and afterwards deposited with a trust company in part payment of the price. "The specific shares were appropriated to the defendants, the price was ascertained, the defendants were entitled to obtain possession of them at any time, upon payment of the balance of the price; the receipt was merely in the nature of a vendor's lien for the price, and the whole transaction was assented to by the defendants; and we are of opinion that this amounted to a transfer of the title, subject simply to the right of the plaintiff to require the trust company to obtain the price before surrendering the possession of the certificates:" C. ALLEN, J., *Frazier* v. *Simmons* (1885), 139 Mass. 531, 535, 536.]

That is, on the one hand, it is said that generally it is immaterial whether the delivery be actual or constructive: *Parks* v. *Hall* and *Arnold* v. *Delano*, *supra*; also, *Mason* v. *Hatton* (1877), 41 Up. Can. Q. B. 610. On the other hand, it has been declared that the lien of the seller always exists until he voluntarily and utterly resigns the possession of the goods sold, and all right to detain them; and that so long as the vendor does not surrender actual possession, his lien remains, although he may have performed acts which amount

to a constructive delivery, so as to pass the title or avoid the Statute of Frauds: *Thompson* v. *R. R. Co., supra.* The latter statement seems more definite and accurate than the former. For the seller's lien includes the right to countermand documents of transfer, as will be presently seen, and this would hardly comport with the former statement of the law, as covering the broadest sense of the term *constructive delivery;* though it might not be requisite that there should be a delivery to the buyer personally, and a delivery to his servant or agent, sometimes called *constructive delivery*, might suffice.

Thus, a delivery to a common carrier, to be by him transported to the buyer, has been held a delivery to the buyer, such as passes the title and divests the seller of his lien, since the carrier is the agent of the buyer and receives the goods for him; *Boyd* v. *Mosely* (1853), 2 Swan. (Tenn.) 661, 663. But, of course, such a delivery would not deprive the seller of his right of *stoppage in transitu.*

Indeed, the rule is, that so long as the vendor has the actual possession of the goods, or as they are in the custody of his agents, and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances: *White* v. *Welsh* (1861), 38 Pa. 396, 420; *Arnold* v. *Delano* (1849), 4 Cush. (Mass.) 33, 39.

[Where notes are given, before maturity there is no lien; but after the notes have been dishonored, and the goods remain undelivered, the vendor's lien attaches without dissolving the original contract, and the vendees could not recover the value of the goods:] *Valpy* v. *Oakeley* (1851), 16 Ad. & El. N. S. 941, 950.

Hence, this rule applies to a sale on credit, so as to allow a refusal to deliver possession if payment is not made when the credit expires: *Hunter* v. *Talbot* (1844), 3 Smedes & M. (Miss.) 754, 761; nor is the rule changed by the fact that notes have been deposited as collateral security, if no money has been realized from them: *Id.;* and the rule even applies if a third person, upon whose credit the goods ordered were sold, becomes insolvent: *Wanamaker* v. *Yerkes* (1872), 70 Pa. 443, 445. Nor does it matter whether the sale is of specific chattels or an executory contract to supply goods: *Griffiths* v. *Perry* (1859), 1 El. & E. 600; or that the property is identified or designated: *Arnold* v. *Delano* (1849), 4 Cush. (Mass.) 33; *Thompson* v. *Balt, Etc., R. R. Co.* (1867), 28 Md. 396.

[Where the contract was to supply bleaching power in monthly portions, and payment was to be received in cash, fourteen days after each delivery, the insolvency of the purchaser relieved the seller from delivering any more goods, until tender of arrearages and for goods to be presently delivered, and no damages would be allowed for such non-delivery:] *Ex parte Chalmers* (1873), L. R. 8 Ch. App. 289, 291.

Withholding delivery may be the remedy naturally available, where the seller retains the custody of the goods as bailee of the buyer, as under an arrangement to pay warehouse rent: *Grice* v. *Richardson* (1877), L. R. 3 App. Ca. 319.

In many cases the vendor may have given documents of transfer, and then the question arises, can he countermand them?

In England, the vendor may stop the delivery of the goods, under his lien for the price, even if he has given a delivery order for the goods, if such order has not been presented to the warehouseman, or other custodian of the goods, and recognized by him:

M'Ewan v. *Smith* (1849), 2 H. L. Ca. 309; *Griffiths* v. *Perry* (1859), 1 E. & E. 680; *Pooley* v. *Gt. West. Ry. Co.* (1876), 34 L. T. (N. S.) 537.

Like views are held in this country, and the seller's lien is held not to be divested by the endorsement and transfer of a delivery order for unpaid goods still in the possession of the seller's agent: *Southwestern, etc., Co.* v. *Stanard* (1869), 44 Mo. 81; [and a sub-purchaser, even holding an order for delivery accepted by the seller, has no greater rights than the original purchaser:] *Southwestern, etc., Co.* v. *Plant* (1870), 45 id. 517. The same has been held of a warehouse order which was countermanded before it was presented to the warehouseman: *Keeler* v. *Goodwin* (1873), 111 Mass. 490, 491, 492; *Ware River R. R. Co.* v. *Vibbard* (1879), 114 id. 447, 454.

A tender of the price, even if not accepted, puts an end to the lien upon the goods sold: *Martindale* v. *Smith* (1841), 1 Q. B. 389, 395, 396. See also *Dempsey* v. *Carson* (Trin. Term, 25 Vic.) 11 Up. Can. C. P. 462, 466.

A partial payment is insufficient to extinguish the lien: *Minzesheimer* v. *Heine* (1855), 4 E. D. Smith (N. Y.) 65, 67; compare, however, *Merchants' Banking Co.* v. *Phœnix B. S. Co.* (1877), L. R. 5 Ch. D. 205: s. c. 22 Eng. 33, 46, where JESSEL, M. R. said, "here it is a case of several payments for several portions of goods, and that, as regards these portions of the goods which have been actually paid for, there is no vendor's lien whatever."

Hence, a partial delivery does not prevent the seller's lien reviving upon the insolvency of the buyer, and attaching to the residue of the property remaining in the seller's custody; and even if the goods have been re-sold, the vendor's lien is in no way affected, unless the seller knew and approved such re-sale: *Hamberger* v. *Rodman* (1880), 9 Daly (N. Y. C. P) 93, 99, per DALY, C. J., citing many authorities.

[Where the purchasers agreed to execute a chattel mortgage, to secure the price of certain hotel carpets, and delivery was made under this agreement, before the execution of the chattel mortgage, the agreement for such mortgage could be enforced in equity and constituted an equitable lien against the purchasers and all claiming under them, except *bona fide* purchasers without notice: but the legal title had passed, and an action of trover against the receiver of the purchasers, for selling the carpets, could not be sustained: *Husted* v. *Ingraham* (1878), 75 N. Y. 251; *Hale* v. *Omaha Nat. Bank* (1876), 64 Id. 555. See also *Alexander* v. *Heriot* (1831), 1 Bail. Eq. (S. C.) 223, 225.

An agreement against a resale until payment of the price, does not give a lien: *Welsh* v. *Parish* (1833), 1 Hill (S. C.) 155, 163. "It is when put in the strongest point of view, only a condition subsequent, constituting a personal undertaking": per JOHNSON, J., Id. 163.

The superiority of vendors' lien on cotton, under the laws of Alabama and Louisiana, over the claims of parties intervening as pledgees, was in question in *Tyree* v. *Sands* (1872), 24 La. An. 363, 364. HOWE, J., said, the vendors "had their lien. They had a right to rely upon it, as upon any other legal protection. There can be no imprudent confidence in trusting one's property to the guardianship of the law. The intervenors, bankers of Mobile, knew the law, and were aware of the possibility of plaintiffs' lien. They might have easily asked if the cotton was paid for; they might have required their money to be used in payment for it:" Id. 366. The lien was sustained.

[Where a mule was purchased at public sale on a credit of nine months,

conditioned upon the purchaser giving approved security, which was not given, the vendor had a lien, which he was not bound to relinquish until the terms of sale had been complied with, and could therefore sue for the price, though the mule had not been delivered to the purchaser: *Wade* v. *Moffett* (1859), 21 Ill. 110].

In short, when goods are sold and there is no stipulation for credit, or time allowed for payment, the vendor has, by the common law, a lien for the price, so that he is not bound to part with the possession of the goods, without being paid for them: *Arnold* v. *Delano* (1849), 4 Cush. (Mass.) 33. But there is no lien for the purchase money of goods, with the possession of which the vendor parts absolutely and unconditionally: *Blackshear* v. *Burke* (1883), 74 Ala. 239, 242. [And no equitable or implied lien, while the vendee retains possession]: *James* v. *Bird's Admr.* (1837), 8 Leigh (Va.) 510. [Therein personalty differs from real estate. "By the Roman law, the vendor could in such a case as this, resort to the property; and so, I think, he may by the civil code of France, notwithstanding article 1583. * * * * All contracts of sale, although positive in their terms, according to these laws, have, it is said, this implied condition: *provided the price is paid.*" But "we were referred to no case, on the argument, and I think the search would be in vain to find one, wherein it has been decided in a court of law or equity in this country, or in England, that, after a sale of personal property and a fair and absolute delivery to the purchaser personally, the vendor can reclaim the property because the consideration has not been paid:" per MARCY, J.], *Lupin et al. Marie & Varet* (1830), 6 Wend. (N. Y.) 77, 82, 83. "The law is well settled, that, when one voluntarily delivers possession of property which is pledged, or upon which a lien exists, without any restriction or qualification, and without insisting upon payment, it is a release or waiver of any security or lien he may have upon such property, for its price:" GARDNER, J., *Wilkie* v. *Day* (1886), 141 Mass. 68, 73, citing *Farlow* v. *Ellis* (1860), 15 Gray (Mass.) 229; *Scudder* v. *Bradbury* (1871), 106 Mass. 422; *Haskins* v. *Warren* (1874), 115 Id. 514; *Upton* v. *Sturbridge Mills* (1873), 111 Id. 446.

The right of lien depends upon the possession (cases, *supra*); and to maintain it, a vendor must have the actual or constructive possession of the goods: *Parks* v. *Hall* (1824), 2 Pick. (Mass.) 206, 212. "To tolerate a lien severed from the possession by any device whatever, would be pregnant with all the mischiefs of colorable ownership; GIBSON, C. J., *Jenkins* v. *Eichelberger* (1835), 4 Watts (Pa.) 123.

The principle that the surrender of the possession is the extinction of the lien, applies especially where the surrender is to a purchaser from the vendor, against whom the lien exists in favor of his factor:" *Gwyn* v. *Richmond, etc., Ry. Co.* (1881), 85 N. C. 429.

[The principle is equally applicable where the property is put in the possession of a brother of the vendor, who is the servant of the vendee. "The property was in the use, and under the complete control and direction of Fuller," the vendee, "and to try to escape the legal consequences of this condition, by showing that the property was in the possession of Fuller's hired servant, as agent or trustee, would be an attempt to evade the provisions of the Statute of Frauds:" HEYDENFELDT, J., *Helm* v. *Dumars* (1853), 3 Cal. 454, 457.]

[The lien also attaches where drillings are delivered from time to time, to be made into sacks, and the manufactured sacks are delivered back to the seller, to hold until payment is made for

the material. But there is no lien while the drillings are in the buyer's possession, for manufacture into sacks; and the buyer could have made a good title upon a re-sale: *Hewlett* v. *Flint* (1857), 7 Cal. 264.]

[Where, however, wool was sold at an agreed price by weight, and removed before payment to a warehouse, to be packed and weighed, and, by the usual course of dealing, the buyer would not remove the wool from the warehouse until payment, actual possession was held to have been given as soon as the wool "was weighed and packed; that it was thenceforward at his," the buyer's, "risk, and, if burnt, must have been paid for by him. Consistently with this, however, the plaintiff had, not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have seen, with the possession having passed to the buyer, so that there may have been a delivery to, and actual receipt by him:" DENMAN, C. J.; and the seller was given judgment for the price of the goods notwithstanding the defence that the goods had never been delivered: *Dodsley* v. *Varley* (1840) 12 A. & E. 141.

Questions relating to express reservations of the seller's lien; to the record and notice of such lien; to the effect of sub-sales, and to conduct, estopping the seller from asserting his rights, must be deferred for future discussion.

NATHAN NEWMARK.

San Francisco, Cal.

["The lien of the purchaser, for the price of goods sold, originated with the Roman Law, and afterwards became incorporated into the Common law. It is a right to retain goods sold, until the whole price is paid. A partial payment, therefore, will not operate to destroy the lien of the vendor upon all the goods, but only to diminish it in value; every single portion of the property sold, being covered by a lien for the smallest fraction of the price:" Story, Sales, § 282; *Exparte Chalmers*, L. R. 8 Ch. App. 289.

["The lien at common law, of the vendor of personal property, to secure the payment of the purchase money, is lost by the voluntary and unconditional delivery to the purchaser; but this does not prevent the parties from contracting for a lien which, as between themselves, will be good after delivery:" WAITE, C. J., *Gregory* v. *Morris* (1877), 96 U. S. 619; abstract S. C. 17 AMER. LAW REG. 601.

[There are special provisions, recognizing and enforcing this lien in the statutes of California (Civil Code, ed. 1885, § 3049); Dakota (Comp. Laws, 1887, § 4439); Louisiana (R. Civ. Code, §§ 3227–3231); and Tennessee (Code, 1884, § 2761).] J. B. U.

Supreme Court of Minnesota.

MINNEAPOLIS THRESHING MACHINE CO. v. DAVIS.

A subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes, *first*, a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and as such it is binding and irrevocable from the date of the subscription; *second*, it is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber, a contract between him and the corporation.

A promoter of a proposed corporation, who solicits and procures stock subscriptions upon a written subscription paper, is the agent of the body of the subscribers to hold the subscriptions until the corporation is formed, and then turn them over to it without any further act of delivery on the part of the subscribers. Hence, a delivery of a subscription paper to such promoter is a complete delivery as to the subscriber making such delivery, so that it becomes, *eo instanti*, a binding contract as between the subscribers.

Where a person subscribes to the stock of the proposed corporation and delivers the subscription to such promoter, and other persons, without notice of any oral condition attached to such delivery, also subscribe to the stock and pay the same in, and in reliance on the subscriptions the corporation is organized, engages in its business, expends large sums of money, and contracts liabilities therein, such person, when sued for instalments due on his stock subscription, will not be allowed to defeat a recovery by showing that he attached a secret oral condition to the delivery of his subscription to the promoter.

Appeal from an order of the District Court for Hennepin County, refusing a new trial after judgment for the defendant.

The material facts are stated in the opinion of the Court.

C. M. Pond, for appellant.

Ferguson & Kneeland, for respondent.

MITCHELL, J., January 31, 1889. This was an action to recover instalments due on subscriptions to stock of the plaintiff. The facts fully appear from the findings of the court in connection with exhibits A and B attached to the complaint.

Those material for present purposes are, that a scheme having been started to organize a manufacturing corporation with $250,000 capital, whose works should be located at Junction City, near Minneapolis, and one McDonald having proposed that, if the citizens of Minneapolis would subscribe $190,000 to the capital stock, he would subscribe the remaining $60,000, one Janney, a promoter, but not a subscriber to the stock of

the proposed corporation, acting as a voluntary solicitor, having with him the subscription paper (Exhibits A and B), about April 1st, 1887, proceeded to canvass for subscriptions to the stock of the proposed corporation on the terms and conditions embodied in the paper. He first applied to defendant, who subscribed to $5,000 of stock. Afterwards, and about the same date, other citizens respectively subscribed to the stock, on the same paper, to the aggregate amount, including defendant's subscription, of $190,000, of which over $65,000 has been paid in to plaintiff. Thereupon McDonald, in accordance with his proposition, subscribed the remaining $60,000, which he has paid up in full. All the conditions expressed in the written subscription (Exhibit A), having been fully performed and complied with, the proposed corporation was afterwards, about April 25th, 1887, organized, and these subscriptions to its stock delivered over to it. The corporation, acting in good faith upon such subscriptions, including that of defendant, expended large sums of money in locating and constructing its works, and entered into large contracts, and incurred liabilities to the amount of over $75,000. During all this time the corporation had no notice or knowledge of any condition being attached to defendant's subscription, other than those expressed in the subscription paper itself. Neither is it found or claimed that any of the other subscribers to the stock had any such notice or knowledge. Defendant was not present at the organization of the corporation, and never attended or took part in any of its meetings, and had no notice or knowledge that the subscription paper had been transferred or delivered over to plaintiff, or that plaintiff relied on it, until about November, 1887, just prior to the commencement of this action.

Upon the trial, the defendant was permitted, against plaintiff's objection and exception, to testify that he signed or subscribed to the stock only upon the express oral condition and agreement then had between him and Janney, that the latter should retain in his possession said agreement with his name signed thereto, and not deliver it to any one, or use it in any way, until certain four persons should subscribe to the stock, each in the sum of $5,000; that Janney took the agreement from defendant on that express condition and understanding,

and not otherwise; that none of these four persons ever did subscribe to the stock of the plaintiff; and that defendant never authorized Janney or any one to deliver said agreement to any one except upon the condition referred to. The Court found the facts to be in accordance with the testimony, and upon that ground found as a conclusion of law, that defendant never became a subscriber to the plaintiff's stock. The competency of this evidence is the sole question in this case. Under the elementary rule of evidence that a written agreement cannot be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which has been organized on the faith of these subscriptions, and upon its creditors. The defendant, of course, does not attempt to controvert so elementary a rule as the one suggested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being pre-requisite to the very existence of a contract. His claim is that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

In determining this question, it becomes important to consider the nature of a subscription to the stock to a proposed corporation, and the relation of the different parties to each other, under the facts of this case. A subscription by a number of persons to the stock of a corporation to be thereafter formed by them, has in law a double character. *First*, it is a contract between the subscribers themselves to become stockholders, without further act on their part, immediately upon the formation of the corporation. As such a contract, it is binding and irrevocable from the date of the subscription, (at

least in the absence of fraud or mistake,) unless cancelled by consent of all the subscribers before acceptance by the corporation. *Second*, it is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber, a contract between him and the corporation: 1 Morawetz on Priv. Corp., sec. 47 *et seq.*; *Red Wing Hotel Co.* v. *Friedrich* (1879), 26 Minn. 112. Janney, the promoter who solicited and obtained the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement, and then turn it over to the company without any further act of delivery on part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers.

It follows, then, that considering the subscription as a contract between the subscribers, a delivery to Janney by any subscriber, was a complete and valid delivery, so that his subscription became, *eo instanti*, a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It cannot therefore be treated as a case where a writing has been delivered to a third party in escrow. The defendant, however, attempts to bring the case within the rule of *Westman* v. *Krumweide* (1883), 30 Minn. 313, in which this Court held that parol evidence was admissible to show that a note delivered by the maker to the payee, was not intended to be operative as a contract from its delivery, but only upon the happening of some contingency, though not expressed by its terms; that is, that the delivery was only in the nature of an escrow. We so held upon what seemed the great weight of authority, although the doctrine, even to the extent it was applied in that case, is a somewhat dangerous one. The distinction between proving by parol, that the delivery of a contract was conditional, and that the contract itself contained a condition not expressed in the writing, is one founded more on refinement of logic than upon sound practical grounds. It endangers the salutary rule that written contracts shall not be varied by parol. Said ERLE, J., in *Pym* v. *Campbell* (1856), 6 E. & B. 370, in sustaining such a de-

fense, "I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defense with suspicion." And in all the cases where such a defense has been sustained, so far as we can discover, they have been cases strictly between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery, and hence no question of equitable estoppel arose. Many of the cases have been careful to expressly limit the rule to such cases: *Benton* v. *Martin* (1865), 31 N. Y. 382; *Sweet* v. *Stevens* (1863), 7 R. I. 375.

Conceding the rule of *Westman* v. *Krumweide, supra,* to its full extent, there are certain well recognized doctrines of the law of equitable estoppel which render it inapplicable to the facts of the present case. This subscription agreement was not intended to be the sole contract of the defendant. It was designed to be also signed by other parties, and from its very nature the defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding his. The paper purports on its face to be a completed contract, containing all the terms and conditions which the subscribers intended it should. When this agreement was presented to others for subscription, defendant had not only signed it in this form, but he had also done what, under the facts, constituted to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel according to the ordinary and usual course of procedure, for passing it over to the corporation, when organized, and clothed Janney with all the *indicia* of authority to hold and use it for that purpose, without any other or further act on his part, untrammeled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the stock but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery.

To permit defendant to relieve himself from liability on any such ground under this state of facts, would be a fraud on others who have subscribed and paid for stock; on the corporation which has been organized and incurred liabilities in reliance upon the subscriptions; and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz., where a person by his words or conduct wilfully causes another to believe in the existence of a certain state of facts, and induces him to act in that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

We have examined all of the numerous cases cited by the defendant's counsel, and fail to find one which, in our judgment, is analogous in its facts, or the law of which will cover the present case. The two which at first sight might seem most strongly in his favor are *Railroad Co.* v. *Palmer* (1865), 19 Wis. 574, and *Railroad Co.* v. *Hall* (1878), 1 Bradw. (Ill.), 612. But an examination of those cases will show that in neither did or could any question of estoppel arise, and in both the Court held that the person to whom the instrument was delivered after signature, was a stranger to it, so that it was strictly a delivery in escrow to a third party.

Cases are cited, where a surety signed a bond or non-negotiable note, and delivered it to the principal obligor, upon condition that it should not be delivered to the obligee until some other person signed it, and where, without such signature, the principal obligor delivered it to the obligee, and yet the courts held that the surety was not liable, although the obligee had no notice of the condition. Such cases usually, too, proceed upon the theory that a delivery to the principal obligor under such circumstances is a mere delivery in escrow to a stranger; the term "stranger," in the law of escrows, being used in opposition merely to the party to whom the contract runs. It may well be doubted whether in such cases, where the instrument is complete on its face, the courts have not sometimes ignored the law of equitable estoppel. No such defense would be allowed in the case of negotiable paper, and it is not clear why the distinction should be drawn on that line. The doctrine of estoppel rests upon totally different grounds, and

operates independently of negotiability, being founded upon principles of equity. But whether the cases referred to be right or wrong, we do not see that they are in point here. Our conclusion is that the Court erred in admitting the evidence objected to, and for that reason a new trial must be awarded.

Order reversed.

1. *The General Rule.*—The established rule of evidence, that a written contract is not to be contradicted or varied by evidence of a parol agreement or understanding, is applied to cases of subscription to the stock of corporations. One reason for so applying this rule is, that, if such evidence were admitted, it would tend strongly towards the commission of a fraud upon other subscribers to the stock: Angell and Ames on Corporations, Sec. 531; Waterman on Corporations, Sec. 193; Cook on Stockholders, Sec. 137.

This principle, enlarged by judicial construction into an equitable estoppel, is applied by the Court in the principal case. It was palpable that the admission of such evidence, for the purpose of a judgment in favor of the defendant, operated unjustly toward other subscribers, who had made their stock subscriptions and became bound thereby, and made payments thereon, in reliance upon the subscription of the defendant.

It is only where the evidence of the parol agreement tends to prove fraud, accident or mistake, that it can be admitted in evidence and considered: Cook on Stockholders, Sec. 137; Waterman on Corporations, Sec. 192; Angell & Ames on Corporations, Sec. 531.

The term "conditional subscription" does not apply to the parol contract set up by defendant in the principal case. Conditional subscriptions proper, are those only in which the condition is a part of the subscription. There are such conditions to the subscription in that case. But oral agreements, contemporaneous with a subscription, will not fall under this head; they are to be considered under the head of fraud, accident or mistake: Cook on Stockholders, Secs. 77, 137.

The release of other stockholders is no defence to an action on a subscription: Cook on Stockholders, Sec. 191.

In England, it has been held that, in such cases, the proper remedy of the subscriber, who complains of the violation of the parol agreement, is by action against the promoter who made the agreement with him: *Felgate's Case* (1865), 2 De G. J. and S. 456.

2. *Authorities Classified.*—The circumstance that the subscription in the principal case was given for the purpose of organizing a new corporation, furnishes ground for a distinction between the various cases that have previously been decided.

An examination of the authorities, with reference to this distinction, suggests this classification.

In the following named cases, the rule was applied to subscriptions, given before the organization of the corporation, for the purpose of promoting the particular corporation: *R. R. Co.* v. *Mason* (1857), 16 N. Y. 451 (attempt by subscriber to revoke subscription); *R. R. Co.* v. *Cross* (1859), 20 Ark. 443 (declaration by promoter as to location); *R. R. Co.* v. *Leach* (1857) 4 Jones (N. C.), 340; *Miller* v. *R. R. Co.* (1878), 87 Pa. 95 (location of road); *Caley* v. *R. R. Co.* (1876), 80 Id. 363; *Wight* v. *Shelby R. R.* (1855), 16 B.

Mon. (Ky.) 4 (a delivery of subscription claimed to be an escrow); *R. R. Co.* v. *Gammon* (1858), 5 Sneed (Tenn.) 567, 571 (that subscribers should have a voice in location of road); *R. R. Co.* v. *Bowser* (1864), 48 Pa. 29.

In the following named cases, the same rule was applied to subscriptions to an existing corporation: *Ferry Co.* v. *Jones* (1859), 39 N. H. 491, 497; *McClure* v. *R. R. Co.* (1879), 90 Pa. 269, 271; *McCarty* v. *R. R. Co.* (1878), 87 Id. 332; *Scarlett* v. *Academy of Music* (1876), 46 Md. 132, 149; *Cowith* v. *Culver* (1873), 69 Ill. 502, 506; *Gelpcke* v. *Blake* (1863), 15 Iowa 387; *Jack* v. *Naber* (1863), 5 Id. 450; *Downie* v. *White* (1860), 12 Wis. 176; *R. R. Co.* v. *Stevens* (1855), 6 Ind. 379; *R. R. Co.* v. *Pearce* (1867), 28 Id. 502; *R. R. Co.* v. *Brush* (1875), 43 Conn. 86.

3. *The Views of the Courts.*—In *Wight* v. *Shelby R. R.* (1855), 16 B. Mon. (Ky.) 4, the claim by the subscriber being that the delivery of his subscription was simply in escrow, and also that he had a parol condition as to the location of the road, the Court held that the party to whom the subscription was delivered, being one of the commissioners for the subscription to the road, could not receive it in escrow; for, to make it an escrow, required that the writing be put in the hands of a third party. The Court said as follows:

"The defense relied upon by Wight, that the subscription of stock made by him was left with one of the commissioners in the nature of an escrow, is wholly invalid. The commissioners were the persons appointed by the charter to receive and accept subscriptions of stock. A subscription received by them, even if such a writing could under any circumstances be made to assume the nature and attributes of an escrow, could not take that character, inasmuch as when it was received by them, it became just as obligatory on the party making it as a promissory note would be upon the maker who left it with the payee, or his agent. The well settled doctrine is, that to make a writing an escrow merely, it must be placed in the hands of a third person by the party making it, to be delivered to the other party on the happening of a specified contingency. Here the subscribers were the parties on one side, and the commissioners on the other. A subscription when made and received by the commissioners, could not, therefore, be a mere escrow, but became in law an absolute undertaking for the stock subscribed according to the provisions of the charter. So far as the defendants, or either of them, alleged that the subscription was conditional, and was not to be obligatory on them, unless the road was located on a certain route, it is only necessary to remark that the contract being in writing, parol proof is inadmissible, to alter its terms or to show that instead of being absolute as it purports to be, it was in reality conditional. The subscribers might have annexed a condition to the terms of their subscription, if they had thought proper to do so, and it would then have been with the commissioners to determine whether such conditional subscription of stock would be received; but not having done so, they cannot, according to the well established doctrine on the subject, allege or prove that the contract was different from that which is evidenced by the writing unless they can establish fraud or mistake in its execution."

In *Miller* v. *R. R. Co.* (1878), 87 Pa. 95, the Court said:

"Every one who signed after him, did so on the faith of his signature, * * * and to permit him now to set up a secret parol arrangement, by which he may be released whilst his fellows continue to be bound, would be any-

thing but just. As was said in the case of *Graff* v. *R. R. Co.* (1858), 31 Pa. 489, a subscription to a joint stock company is not only an undertaking to the company, but with all other subscribers."

In *R. R. Co.* v. *Gammon* (1858), 5 Sneed (Tenn.) 367, where the parol condition set up was, that the subscriber should have voice in the location of the road, the Court said: "By his subscription for a certain number of shares, at a certain sum, he became liable for the amount of his subscription, on the same principle that the maker of a promissory note renders himself liable. The subscription being equivalent to a promissory note, it is clear that parol evidence of previous or contemporaneous negotiations, stipulations or terms, not incorporated in the subscription paper, could not be admitted to vary or contradict the terms of the written instrument.

In *Ferry Co.* v. *Jones* (1859), 39 N. H. 491, the defendant set up a representation to him by another subscriber, not an officer, that the ferry to be built was to be a horse ferry; in fact, a steam ferry was built. It was held that the party making the representation was not an agent of the company, and that the company would not have been bound by the representation, even if he had been its agent. The Court said:

"Another question raised is, whether the representation made at the time the defendant and Somerby subscribed for stock, by the person who had the paper, was competent evidence to be considered, and if so, was it material? Did it or could it affect the case? We think it was not competent, and would not have been so, even if the person making it had been the agent of the company. It was only a verbal statement, and does not come within the rule stated in *White Mountains R. R.* v. *Eastman* (1856), 34 N. H. 124, where it was held that a contract, *in writing*, given back to a subscriber for stock, at the same time of the subscription, by an agent of the company authorized to contract, providing that the terms of the subscription might be modified in a certain way, might be valid as part of the original contract of subscription, as between the parties, provided it did not operate as a fraud upon others. But this case is more like *George* v. *Harris* (1829), 4 N. H. 533, where it was held that where a promise is direct, positive, unconditional, and in writing, parol evidence is inadmissible to contradict or vary such contract. And the further reason then stated also applies here, that the defendant's putting upon paper an unconditional promise to pay, may have induced others, not only to subscribe, but to pay, and his attempts now to shield himself by this private understanding may be a fraud upon others, who have thus been induced to subscribe and to pay. Parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible, inoperative and void: *Conn. & Pass. River R. R.* v. *Bailey* (1852), 24 Vt. 465."

In *McCarty* v. *R. R.* (1878), 87 Pa. 332, the subscriber alleged a parol condition, that the road was to be built to a certain point; and a further promise by the officers of the road to incorporate this condition into his subscription; so that the case turned on a question of fraud. The Court said as follows:

"Where subscriptions are made to the stock of a proposed public corporation, previous to and for the purpose of procuring a charter, any condition annexed thereto, whether written or parol, are void. But after the organization of the company, a condition is binding and obligatory, and ordinarily, this is so, though it rests in parol, if, except for such condition, the subscription

would not have been made. The latter part of this proposition is subject, however, to the qualification that the rights of co-subscribers are not affected thereby: *R. R.* v. *Bowser* (1864), 48 Pa. 29; *Caley* v. *R. R. Co.* (1876), 80 Id. 363; *Graff* v. *R. R. Co.* (1858), 31 Id. 489; and *Miller* v. *R. R. Co.* (1878), 87 Id. 95."

In *Corwith* v. *Culver* (1873), 69 Ill. 502, the defendant had never delivered the subscription. It had remained in his possession, and had never passed into the hands of the corporation. Defendant claimed that it was to be delivered only on condition that he could effect a certain loan, which he had failed to do. It was held to be a valid subscription. The Court said:

"The subscription by the defendant was absolute on its face; it is inadmissible to show that it was only conditional. The rule forbidding the introduction of parol evidence to explain a written instrument, meets with no exception in the case of a subscription paper for stock of a corporation: Angell and Ames on Corp., § 146; *Banet* v. *A. & S. R. R. Co.* (1851), 13 Ill. 509. Such a secret condition attached to the subscription, would be a fraud upon the other subscribers, and the subscription should be enforced without regard to it: *Downie* v. *White* (1860), 12 Wis. 176; *White Mount. R. R.* v. *Eastman* (1856), 34 N. H. 124; *Mann* v. *Cook* (1850), 20 Conn. 178; *Smith* v. *Heidecker* (1866), 39 Mo. 157."

In *R. R. Co.* v. *Brush*, 43 Conn. 86 the language of the Court was as follows:

"When Myers & Co. subscribed, the contract for building the road had not been executed. The subscription therefore was not then affected by the written contract. The parol agreement cannot, upon any principle, have the effect to vary or qualify the written contract of subscription. It is familiar and elementary law, that all negotiations between the parties, relating to the subject matter, are merged in the written contract. Neither party will, therefore, be permitted to prove by parol, a contract different from that expressed in the written instrument. Is it so that a party, for the purpose of relieving himself of an obligation, will be permitted to show by parol that this written contract is different from what it purports to be on its face? We are not aware of any principle of law that will justify such a proceeding."

4. *Delivery in Escrow.*—Among the cases above cited are the following, in which the question was, as in the principal case, one of a condition to the delivery of the subscription: *Wight* v. *R. R. Co.* (1855), 16 B. Mon. (Ky.) 4; *Corwith* v. *Culver* (1873), 69 Ill. 502.

There are two cases found in the books, in which the parol condition as to delivery, was allowed to defeat the subscription and excuse the subscriber from compliance; but each of these cases is one of subscription to the stock of an already existing corporation. These are the two named in the principal case: *R. R. Co.* v. *Palmer* (1865), 19 Wis. 574; *R. R. Co.* v. *Hall* (1878), 1 Bradw. (Ill.) 612.

In the Wisconsin case, the subscription was not signed by the supposed subscriber, but by another person for him, who was a promoter, not of the corporation, but of the particular subscription. The supposed subscriber authorized the delivery of this subscription, only upon certain conditions which had not been performed. The Court held, that as the promoter who received the subscription was not an agent of the company, he was therefore a third party; so that the principles as to a delivery in escrow were applicable. In the Illinois case, there was a conditional delivery of the subscription in escrow to the Director of the Railroad Com

pany; and the Court held that the facts of the case made this director a third party, so that the delivery was really in escrow.

There are other cases, seemingly analogous here, yet to be distinguished by their facts. In *Ticonic Water Co.* v. *Lang* (1874), 63 Me. 480, the question of delivery related to a proxy. One defendant had never subscribed to the stock at all; and he had delivered a proxy in escrow, which was considered in the case. *Cass* v. *Railway Co.* (1875), 80 Pa. 31, is not in point. It was a case of an existing corporation and a written condition in a subscription. The agent of the company took the subscription in escrow. It was held that this agent had no authority to accept the written condition, hence, there was no delivery. *Burrows* v. *Smith* (1853), 10 N. Y. 550, a case in equity, did not turn on the question of a parol condition to a written subscription. Plaintiff did not sue on the written subscription; his suit was an effort to set up another and different subscription by estoppel, against which the Equity Court let in evidence of parol stipulations.

The principal case is the first one in which an appellate court has passed upon the question of an attempted condition to the delivery of a stock subscription given for the purpose of promoting a new corporation.

5. *The Status of the Subscription Agreement.*—The ruling in the principal case as to the double character of the subscription agreement, is well supported by authority. It is a general rule that an agreement to take shares in order to form a corporation, is a continuing offer, subject to acceptance by the corporation after it is formed: 1 Morawetz on Corporations, Sec. 47, 48, 51. The subscription inures to the benefit of the corporation when formed: Waterman on Corporations, Sec. 177; *R. R. Co.* v. *Gammon* (1858), 5 Sneed (Tenn.) 567; *Taggart* v. *R. R. Co.* (1866), 24 Md. 563; *R. R. Co.* v. *Clayes* (1848), 21 Vt. 30; *R R. Co.* v. *Dummer* (1855), 40 Me. 172; *R. R. Co.* v. *Mason* (1857), 16 N. Y. 451.

The subscriber's interest in, and his right to, a share in the operations of the company, are the consideration for his contract: 1 Morawetz on Corporations, Sec. 56; *R. R. Co.* v. *Robbins* (1877), 23 Minn. 439; *Music Hall Co.* v. *Cary* 116 Mass. 471; *R. R. Co.* v. *Clayes*, 31 Vt. 30.

The corporation is the proper party to bring suit on such subscription: 1 Morawetz on Corp., Sec. 50; Cook on Stockholders, Sec. 67; *Music Hall Co.* v. *Cary* (1874), 116 Mass. 471; *Upton* v. *Tribilcock* (1875), 91 U. S. 45; *Chubb* v. *Upton* (1877), 95 Id. 665.

Mr. Taylor's full statement of the doctrine is as follows:

"The corporation having been formed, and A, not having in the meantime withdrawn from the agreement, if B, C and D, etc., take and pay for their shares as agreed, they (or the corporation, if it shall appear to have been the intention that the corporation should have the right to enforce the promise) can then force A to take and pay for his shares as well; for if, relying on A's promise, or, more strictly speaking, unwithdrawn offer to take shares, B, C and D, etc., have actually taken shares themselves, they have thereby accepted A's unwithdrawn offer, by performing that act, which was intended to be, when performed, a valid consideration, which should convert A's unwithdrawn offer into a binding promise; and in truth, therefore, they have thus transformed A's unwithdrawn offer into a binding promise, the performance of which may be enforced by the parties who have themselves performed, or by the corporation, if such was the intention:" Taylor on Corporations, 93.